

1984 WL 249831 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 15, 1984

*1 The Honorable Arthur Ravenel, Jr.
Senator
District Number 16
608 Gressette Building
Columbia, South Carolina 29202

Dear Senator Ravenel:

You have asked whether the Mental Health Commission may fill a vacancy in the position of Commissioner of Mental Health, either on an ad interim basis or otherwise, with a person who is neither a psychiatrist nor a medical doctor having training in psychiatry. We would advise that under existing statutes, the vacancy is required to be filled with a person who is a medical doctor.

[Section 44-9-40, Code of Laws of South Carolina \(1976\)](#), appears to provide the sole method for appointment of the State Commissioner. It, in part, sets forth the following qualifications: 'The State Commissioner shall be a medical doctor duly licensed in South Carolina with approved training and experience in psychiatry.' Words used in a statute are to be given their plain and ordinary meaning. [Worthington v. Belcher, 274 S.C. 366, 264 S.E. 2d 148 \(1980\)](#). The term 'medical doctor,' given its plain and ordinary meaning, refers to a person subject to licensure by the Board of Medical Examiners pursuant to Section 40-47-10, et seq. of the Code. Furthermore, use of the term 'shall' connotes mandatory compliance with the statute. 2A [Sutherland Statutory Construction](#) § 57.03. Therefore, it would be mandatory that the Mental Health Commission appoint as Commissioner one who is licensed by the Board of Medical Examiners as a medical doctor, who has approved training and experience in psychiatry, for that person to be considered as occupying the position of State Commissioner in a de jure capacity.¹ Otherwise, '[t]he appointment of an ineligible person is an absolute nullity.' 67 C.J.S. [Officers](#) § 19.

The above-cited statute appears to be the sole statute providing for appointment of the Commissioner. Furthermore, no distinction is made in the statute between an ad interim Commissioner and one who would serve a designated term set by the Commission. See, 2 [Words and Phrases](#), 'Ad Interim,' p. 584. Therefore, we would advise that anyone filling the office of Commissioner, whether interim or otherwise, would be required to possess the qualifications of a medical doctor as required by [Section 44-9-40 of the Code](#).

It must be noted, however, that the law apparently recognizes a distinction between an ad interim appointment to a particular office, such as the Commissioner of Mental Health and one who, while holding one office, simply performs the duties of another for a short period of time, i.e. an 'acting' officer. An 'acting officer' merely performs temporarily the duties of an office to which he himself does not claim title, 2 [Words and Phrases](#), 'Acting Officer', p. 20; but an 'interim officer' actually has title to the office in question on a temporary basis. 2 [Words and Phrases](#), supra at 584. As noted above, we believe one appointed as interim Commissioner would be required to possess the qualifications of a medical doctor, pursuant to [Section 44-9-40](#).²

*2 In conclusion, we would advise that any vacancy in the office of Commissioner of Mental Health is required to be filled with a person who is a medical doctor duly licensed in South Carolina with approved training and experience in psychiatry. Whether the office is held by one on an interim basis or otherwise, these statutory qualifications must be met.

We hope that the above satisfactorily responds to your inquiry. If we may be of further assistance, please advise us.

Sincerely,

Patricia D. Petway
Staff Attorney

Footnotes

- 1 One occupying a de jure position is one 'who is in all respects legally appointed and qualified to exercise the office.' 63 Am.Jur.2d Public Officers and Employees § 495 (emphasis added); see §§ 493 et seq. for ramifications of an officer who is not serving in a de jure capacity.
- 2 The relevant statutes do not address, however, the question whether the Commission could simply designate one not a medical doctor as 'acting' Commissioner (to be distinguished from filling the vacancy on an interim basis). Such authority, where it exists, is usually made explicit by statute. Compare, Section 17-5-70 (deputy coroner may act as coroner); Section 17-5-80 (magistrate as coroner); Section 23-15-120 (coroner as sheriff).
We believe the intent of [Section 44-9-40](#) in setting the Commissioner's qualifications is clear, and little deviation from the express mandate contained therein is available. Nevertheless, we recognize that a court possibly could uphold, based upon general law, the temporary assumption of the Commissioner's duties by an 'acting' Commissioner, simply to insure continuity in fulfillment of the Department's statutory purpose. See, 67 C.J.S., Officers, § 280, p. 817-819; see also, Section 44-9-30. However, even if a court found such authority to designate one as 'acting' Commissioner, as defined above, we believe the court would limit the scope and duration of that authority to affording a reasonable opportunity to fill the vacancy in the office.

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